In the

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 497

LEONARD L. EDWARDS,
Petitioner,

v.

BINGHAM PUMP COMPANY, INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT
AND
BRIEF FOR PETITIONER
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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No.

LEONARD L. EDWARDS,
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v.
BINGHAM PUMP COMPANY, INC., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Leonard L. Edwards, plaintiff, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a judgment of that Court entered May 13, 1941, denying plaintiff's petition for rehearing.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The material and essential facts are:

This action was brought by petitioner Feb. 24, 1934, in the United States District Court for the District of Oregon to enjoin infringement of Letters Patent No. 1,927,395 granted to himself Sept. 19, 1933, for Gear Pumps (R. p. 1).

The District Court referred the case to a Master (R. p. 21), who heard the evidence, *and after full trial on the merits,* entered a Report, Sept. 4, 1935 (R. p. 23), finding the patent valid and infringed. Respondent excepted Sept. 24, 1935, to the Master's findings as to infringement, *but not as to validity of the patent* (R. p. 48). Respondent's Exceptions were overruled (R. p. 55) and an Interlocutory Decree ordering an injunction and an accounting was entered by the District Court, *January 20, 1936* (R. p. 61). Respondent's Petition for Rehearing, filed Jan. 22, 1936 (R. p. 65), Motion to Remand to Master filed Jan. 29, 1936 (R. p. 77), and Supplementary Petition for Rehearing filed Feb. 10, 1936 (R. p. 40) were denied by the Court *March 23, 1936* (R. p. 84). *Respondent did not appeal from the Interlocutory Decree of January 20, 1936, at any time,* although it could have done so within thirty days, under Title 28 U.S.C. Sec. 227, and 227a. On *April 27, 1936,* no appeal from the Interlocutory Decree having been taken in the meantime, the parties started taking testimony before the Master in the accounting, which testimony was concluded May 14, 1936 (R. pp. 130–131). On May 25, 1936 (R. p. 85), Respondent filed a Petition to Reopen and to File an Amended Answer, which was referred to the Master June 1, 1936 (R. p. 118), to report thereon in connection with his report on the accounting. The Master reported June 24, 1936 (R. pp. 129 and 153), denying the Petition to Reopen and finding damages of $3120. The District Court (Judge Fee succeeding Judge McNary, who had died in the meantime), March 20, 1939 (Opinion R. p. 217), affirmed the Master's rulings but increased the damages awarded to $8500, and a Final Decree in accordance therewith (R. p. 242) was entered Oct. 9, 1939.

Respondent appealed from the Final Decree on Dec. 5, 1939 (R. p. 244). The Circuit Court of Appeals for the Ninth Circuit, March 13, 1941, rendered an Opinion (R.

p. 786, reported in 118 F. (2d) 338) finding the patent invalid and dismissing the bill. A Decree in accord was entered the same day (R. p. 793). Petitioner on April 24, 1941, within the time allowed therefor by rule of Court (R. p. 794), filed a petition for rehearing, which was denied May 13, 1941 (R. p. 794).

The Court of Appeals rejected petitioner's contentions (A) that the questions of validity and infringement of the patent were not open for consideration, *having been waived by respondent's failure to appeal from the Interlocutory Decree* (entered *after final hearing*, and, in fact, *final*, except for the accounting), and that the Court was without jurisdiction to consider them, and that the only question was whether the award of $8500 damages under the accounting was correct and proper; and (B) that respondent could not contest validity of the patent because it failed to except to the Master's findings as to validity, as required by Equity Rule 66 in force at that time, and the Court held that the Rules of Civil Procedure (Rule 52b) no longer required such exceptions, and gave the Rules a retroactive effect three years prior to their actual operation.

A). The Failure to Appeal From the Interlocutory Decree.

The decision of the Court of Appeals on this question is directly contrary to the express intent and purpose of Congress in permitting appeals from interlocutory decrees, and decrees which are final except for the ordering of an accounting, under 28 U.S.C. Sec. 227 and 227a.

The appeal statutes here involved are Title 28 U.S.C. Sec. 227 and 227a which read (so far as here material):

> "Section 227. Where, upon a hearing in a district court, . . . an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an in-

junction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court may, in its discretion, require an additional bond as a condition of the appeal." . . .

"Section 227a. When in any suit in equity for the infringement of letters patent for inventions a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals; Provided, That such appeal be taken within thirty days from the entry of such decree or from February 28, 1927; and the proceedings upon the accounting in the court below shall not be stayed, unless so ordered by that court, during the pendency of such appeal." (Feb. 28, 1927, c. 228, 44 Stat. 1261.)

The Respondent could have appealed from the Interlocutory Decree of Jan. 20, 1936, entered after final hearing, and which was also final except for the ordering of an accounting, under either Section, at any time within 30 days, and obtain a

full hearing on the merits. Failing to do so, it caused Petitioner to proceed with the accounting, at an expense to himself of $3250—a wholly needless and avoidable expense, if Respondent had appealed from the Interlocutory Decree, as it should have done.

The express intent and purpose of Congress in 1891 in permitting appeals from interlocutory decrees granting injunctions in Sec. 227, was to *prevent the great delay and expense to the parties of useless accountings,* if the Court of Appeals should hold the Plaintiff's bill without merit and thus reverse the District Court, which *after final hearing* had ordered the injunction and accounting. Previously the defendant could appeal only from the *final decree after* the accounting. Great hardship and expense to litigants resulted from *unnecessary accountings* and in 1891 the appeal statute was amended to correct that very situation.

Sec. 227a was enacted in 1927 to prevent *unnecessary accountings* in the special situation where the patent had expired pending suit, and no injunction could accordingly be granted, and the defendant thus could not appeal from the interlocutory decree (final except for the ordering of an accounting) under Sec. 227. The language of Sec. 227a is broad enough, however, to have permitted Respondent to appeal in the present case, had it so desired, even though the patent had not expired and an injunction was granted.

The decision is in conflict with the decision of this Court in an analogous situation:

> *Ensten* v. *Simon, Ascher & Co.,* 282 U.S. 445 at 457–8 (1930),

and also in conflict with a decision of the Circuit Court of Appeals of the Eighth Circuit:

> *Austin-Western Machinery Co.* v. *Disc Grader Co.,* 291 Fed. 301 at 303 (C.C.A. 8, 1923),

and is also in conflict with a previous decision of the Ninth Circuit, not mentioned in the Court's Opinion here nor expressly overruled:

O'Nate v. *Bahr,* 67 F. (2d) 180 at 181 (C.C.A. 9, 1933).

The decision also construes the Appeal Statutes in conflict with the following fundamental and long established principles of appellate procedure and review:

a). That a party who fails to appeal from an appealable decree, or who fails to raise questions on a previous appeal which he could have raised, *waives his right to be heard thereon and cannot raise the same questions in any subsequent appeal.*

b). That where separate appeals are permitted in various stages of a litigation, questions decided on the first appeal (or which could have been decided) will not be re-examined on the second appeal. The second appeal brings up nothing but the proceedings subsequent to the mandate on the first appeal.

c). That fragmentary or piecemeal appeals in the same litigation raising different points successively on the same record will not be permitted.

B). The Failure to Except to the Master's Report.

The Court of Appeals, in permitting Respondent to contest validity of the patent, after failing to except to the Master's findings thereon in Sept., 1935, as required by the then existing Equity Rule 66, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

It is settled, of course, beyond any dispute by the decisions of this Court and other Courts of Appeal, that under established equity practice and Federal Equity Rule 66, a party cannot raise questions in a Court of Appeals on which he has failed to except in the Master's report.

The decision of the Circuit Court of Appeals giving a retroactive effect to the Rules of Civil Procedure (52b) effective Sept. 16, 1938, to relieve Respondent from the necessity of excepting to the Master's report filed three years previous, is in conflict with the decisions of the Ninth Circuit itself and other Circuit Courts of Appeal in:

Hill v. *Ohio Casualty Ins. Co.,* 104 F. (2d) 695, at 696 (C.C.A. 6, 1939);

Nielson v. *Utah Construction Co.,* 104 F. (2d) 887, at 892 (C.C.A. 9, 1939);

Leach v. *Ross Heater & Mfg. Co.,* 104 F. (2d) 88 at 90 (C.C.A. 2, 1939);

Schlaefer v. *Schlaefer,* 112 F. (2d) 177 at 181–182 (C. A. D.C. 1940).

QUESTIONS RAISED BY THE CASE.

The case, therefore, raises the following questions:

1. May a party, who *after final hearing,* fails to appeal within 30 days from an interlocutory decree granting an injunction, or from a decree whch is final except for the ordering of an accounting, as permitted by Title 28 U.S.C. Secs. 227 and 227a, *and causes his opponent to proceed with the accounting,* thereafter appeal from the final decree after accounting, and raise the same questions as to the merits of the plaintiff's claim which he might have raised on an appeal from the interlocutory decree (or decree which is final except for the accounting), or is he limited to matters arising in the accounting and occurring subsequent to the interlocutory decree (or decree which is final except for the accounting)?

2. In other words, does a defendant who, *after final hearing,* can appeal from an interlocutory decree granting an injunction, or from a decree which is final except for the ordering of an accounting, under Title 28, Secs.

227 and 227a, and obtain a complete review of the merits of the plaintiff's claim, and can thereby prevent the delay and expense of an unnecessary accounting, if the plaintiff's claim is not sustained by the Court of Appeals, but who fails to avail himself of his right to appeal, *and thereby causes the plaintiff to proceed with the accounting,* waive his right to be heard as to the merits of the plaintiff's claim, and limit himself to an appellate review only of the award of damages and profits on accounting on his appeal from the final decree after accounting?

3. Or, in other words, is Title 28, U.S.C. Secs. 227 and 227a to be construed as permitting a party, *after final hearing,* to withhold his appeal on the merits until after he has put his adversary to the trouble and expense of an unnecessary accounting, *contrary to the express purpose of Congress* in permitting appeals from interlocutory decrees, and decrees which are final except for the ordering of an accounting, under Secs. 227 and 227a?

4. Are the new Rules of Civil Procedure, and particularly Rule 52(b) thereof, which became effective Sept. 16, 1938, retroactive in their operation to relieve a defendant from the necessity of excepting within 20 days to a Master's Report filed Sept. 4, 1935, as required by the then existing and applicable Equity Rule 66?

These important questions of Federal law *under Title 28, U.S.C. Secs. 227 and 227a,* have never been passed upon by this Court. It is of utmost importance that they should be. These questions have troubled the Circuit Courts of Appeals since 1891 and a proper answer is essential to the orderly and efficient administration of justice, in both trial and appellate Federal courts, in preventing the great waste and delay of useless accountings, and in preventing the overcrowding of the already over-burdened Circuit Courts of Appeals with unnecessary fragmentary and piecemeal appeals.

The decision of the Court of Appeals in relieving Respondent of the necessity of excepting to the Master's Report as to validity of the patent, as required by the then existing Equity Rules, by applying the new Rules of Civil Procedure not effective until three years later, is so contrary to settled law and practice, and so far a departure from the accepted and usual course of judicial proceedings, as to clearly require the intervention of this Court, we respectfully submit.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your Petitioner respectfully prays that the Writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals herein disregards, and is contrary to, the express intent of Congress in permitting appeals under Title 28, U.S.C. Secs. 227 and 227a.

2. Because the decision herein is in conflict with the decision of this Court in *Ensten* v. *Simon, Ascher & Co.,* 282 U.S. 445 at 457–8 (1930) in an analogous situation.

3. Because the decision of the Circuit Court of Appeals herein is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Austin-Western Machinery Co.* v. *Disc Grader Co.,* 291 Fed. 301–303 (C.C.A. 8, 1923) and with its own previous decision in *O'Nate* v. *Bahr,* 67 F. (2d) 180–181 (C.C.A. 9, 1933) not referred to herein nor expressly overruled.

4. Because the Circuit Court of Appeals herein has improperly construed Title 28, U.S.C. Secs. 227–227a in a manner conflicting with fundamental and long established principles of appellate procedure.

5. Because the public interest in the avoidance of unnecessary accountings and fragmentary and piecemeal appeals, with the great waste of time of courts, masters

and litigants, and the needless expense caused thereby, and in the prompt and efficient administration of justice, in both trial and appellate courts, requires that the question as to the effect of failure to appeal from an interlocutory decree involving an injunction, and which is final except for the ordering of an accounting, under 28 U.S.C. Secs. 227 and 227a, be settled.

6. Because it thus appears that an important question of Federal law and procedure is presented, which has not been, but should be expressly decided by this Court.

7. Because the Court of Appeals, in relieving Respondent of the necessity of excepting to the Master's Report, as required by the Equity Rules in force at that time, and giving retroactive effect to the Rules of Civil Procedure not effective until three years after the Master's Report in qustion, has so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's powers of supervision.

8. Because the decision of the Court of Appeals herein as to respondent's failure to except to the Master's Report on validity of the patent is contrary to the decisions of that Court itself and other Circuit Courts of Appeal, in *Hill* v. *Ohio Casualty Ins. Co.*, 104 F. (2d) 695, at 696 (C.C.A. 6, 1939); *Nielson* v. *Utah Construction Co.*, 104 F. (2d) 887, at 892 (C.C.A. 9, 1939); *Leach* v. *Ross Heater & Mfg. Co.*, 104 F. (2d) 88 at 90 (C.C.A. 2, 1939); and *Schlaefer* v. *Schlaefer*, 112 F. (2d) 177 at 181–182 (C.A.D.C. 1940).

PRAYER.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and

complete transcript of record and all proceedings in the case numbered and entitled on its docket No. 9485, Bingham Pump Company, Inc., a corporation, Defendant-Appellant *v.* Leonard L. Edwards, Plaintiff-Appellee, and that the said Decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

LEONARD L. EDWARDS, *Petitioner,*
by GEORGE P. DIKE,
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of Counsel.